

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs January 30, 2008

**IN THE MATTER OF J.O.M.**

**Appeal from the Juvenile Court for Sullivan County**  
**No. J32,298     Mark H. Toohey, Judge**

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**No. E2007-02219-COA-R3-PT - FILED FEBRUARY 19, 2008**

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The Juvenile Court terminated the parental rights of J.S. ("Father") to his son, J.O.M. (the "Child"). The Juvenile Court determined that the Department of Children's Services ("DCS") had proven by clear and convincing evidence that grounds existed to terminate Father's parental rights. Specifically, Father had been confined in a correctional facility under a sentence of ten or more years and the Child was less than eight years old at the time the criminal sentence was imposed. The Juvenile Court also concluded that there was clear and convincing evidence that terminating Father's parental rights was in the Child's best interest. Father appeals raising various challenges to the Juvenile Court's judgment. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Randall D. Fleming, Kingsport, Tennessee, for the Appellant, J.S.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children's Services.

## **OPINION**

### **Background**

This appeal involves the Juvenile Court's entry of an order terminating Father's parental rights to the Child. The Child was born on March 30, 1998, and initially came into DCS custody in November of 2004 because there was no one available to care for him. At that time, Father was incarcerated, and he has been incarcerated since December of 2003.

On November 9, 2005, the Child's biological mother voluntarily surrendered her parental rights. No appeal was taken from that voluntary surrender, and the order terminating the biological mother's parental rights has long since become final.

On March 6, 2006, Father was found guilty by a jury of: (1) criminal conspiracy to sell more than .5 grams of cocaine within a school zone, a Class B felony; and (2) maintaining a dwelling for drug use, a Class D felony. Father was sentenced to two consecutive 12 year terms in prison, for a total of 24 years. When the sentence was imposed, the Child was seven years old.

On November 9, 2006, DCS filed a petition to terminate Father's parental rights. DCS alleged, among other things, that Father had abandoned the Child by willfully failing to pay child support and willfully failing to visit the Child within the four month period immediately preceding the filing of the petition. DCS also alleged Father had abandoned the Child by exhibiting a wanton disregard for the Child's welfare. Finally, DCS claimed that Father's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6) because Father had been sentenced to a prison term of ten or more years and the Child was under the age of eight at the time the sentence was imposed.

A trial on the petition to terminate Father's parental rights was held on February 26, 2007. Father was present at the trial and was represented by counsel. Prior to the trial beginning, Father announced to the Juvenile Court that he wanted voluntarily to surrender his parental rights. In light of this announcement, the Juvenile Court thoroughly questioned Father to make sure he understood the ramifications of voluntarily surrendering his parental rights and to be certain that such surrender was voluntary. Part of this discussion was as follows:

THE COURT: Well, you understand I'm just trying to make sure, I have to make sure when somebody is going to make a decision of this magnitude I have to make sure you understand what's going on and there's no problems. That's ... the reason I'm asking you these questions.... I need to ask you on the record here, are you contesting this Petition to Terminate your parental rights [to the Child]?

FATHER: No. No....

THE COURT: All right. I'm just trying to make sure you understand though that ... [once] this Termination of Parental Rights ... Order is entered and once your time for appeal expires, that will be the end of your parental relationship. Do you understand that?

THE FATHER: Yes, Sir....

THE COURT: Is that what you choose to do?

THE FATHER: It's what I choose to do....

THE COURT: Do you think it's in your [child's best] interest?

THE FATHER: Yes, Sir, I do.

After the above discussion took place, DCS presented its proof supporting its petition to terminate Father's parental rights. Father was present in the courtroom at this time. Carrie Shatz ("Shatz"), a placement specialist with DCS, testified that [the Child] initially came into DCS custody in November of 2004. Shatz also explained to the Juvenile Court that the Child's biological mother had voluntarily surrendered her parental rights in November of 2005. According to Shatz, Father had not visited with the Child since the Child came into DCS custody. When asked if Father had engaged in any "wanton disregard" for the Child's welfare, Shatz stated that he had. According to Shatz:

[Father] has several, has been convicted of several felonies. He was convicted of selling cocaine within a school zone and was given 12 years for that in March of 2006.... There was also a charge for maintaining a dwelling for drug use and that went along with that in March of 2006 with the 12 year sentence.<sup>1</sup>

Shatz added that the Child was under the age of eight when the above-referenced criminal sentences were imposed.

Shatz stated that Father has never paid any child support. According to Shatz, Father was unable to provide a suitable home for the Child and he would not be able to provide a suitable home in the near future given his incarceration. Shatz explained that the Child was currently in a foster home and that he was doing well and making good grades in school. The foster parents were meeting the Child's emotional, physical, and developmental needs. Shatz added that the foster parents were considering whether to adopt the Child. Finally, Shatz explained that there was no meaningful relationship between Father and the Child, and it would be in the Child's best interest for Father's parental rights to be terminated.

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<sup>1</sup> As noted previously, the two 12 year sentences were ordered to be served consecutively.

As Shatz' testimony proceeded, Father told the Juvenile Court that he wanted to leave the courtroom because he did not want to stay and listen to Shatz continue to "bash" him. The Juvenile Court explained to Father that it was necessary for DCS to put on its proof in this type of proceeding. The Juvenile Court again offered Father the opportunity to proceed with a contested hearing. Father expressly declined. Father acknowledged that having the Child "sitting in the foster care not knowing when I'm coming out [of prison] ain't going to get it." Father eventually decided to stay in the courtroom.

Following the conclusion of DCS's proof, the Juvenile Court announced its ruling from the bench. According to the Juvenile Court:

I find that [Father] is no doubt the [biological] father of [the child]. I further find that the child's mother has previously executed a surrender of parental rights [to the child]. I find that the State has failed to establish abandonment ... [by Father because he] has been in jail the whole time that this Petition has been filed and I haven't heard any proof about what he was doing in terms of child support or visiting the child prior to the time he was incarcerated, so I don't find that he willfully abandoned [the child]. I do find that he is serving a sentence of 10 years or more in the State penitentiary and ... it's a 24 year sentence and I have certified copies of judgments from the Criminal Court.... I further find that [the child] was under the age of 8 at the time that [Father] was convicted.... [As] to ground three, the sentence of 10 years or more and [the child] is under 8 at the time, TCA § 36-1-113(g)(6), I don't know if I stated it, but I find that by clear and convincing evidence that the ground was proven.... I further find that it is in the child's best interest for this termination to occur.

Father appeals raising three issues. First, Father claims that he was not advised that the Child's biological mother's parental rights already had been terminated. Father asserts that had he known this, he would not have voluntarily surrendered his rights. Second, Father claims that he did not abandon the Child because he was in prison and, therefore, was unable to visit with the Child. Third, Father claims that DCS failed to provide the biological mother with adequate assistance before terminating her parental rights.

### **Discussion**

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the

correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

*In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006).

As to Father's first issue, it was made perfectly clear at the trial that the biological mother's parental rights had been terminated long before this trial. This was specifically testified to by Shatz and again pointed out by the Juvenile Court. At no time did Father indicate at trial that he did not know this or, if he had just learned of it, that it would have affected his ultimate decision to relinquish his parental rights. Even after Shatz testified that the biological mother's parental rights had been terminated, Father was given an opportunity to let the Juvenile Court know if he had changed his mind and wanted to proceed with a contested hearing. Father unequivocally stated that he did not. Therefore, Father's first issue is without merit.

Father's second issue is that he did not abandon the Child. We agree. However, this really is not in dispute given that the Juvenile Court specifically held that there was insufficient proof that Father had abandoned the Child and DCS has not appealed this finding. In short, the Juvenile Court did not find that Father had abandoned the Child.

Father's third issue seems to attack the validity of the order terminating the biological mother's parental rights. This issue is without merit given that Father has no standing to attack a final order terminating another person's parental rights. The order terminating Mother's parental rights has long since become final as no appeal was filed in those proceedings.

Father does not claim that grounds to terminate his parental rights had not been proven by clear and convincing evidence. Nor does he claim that DCS failed to prove by clear and convincing evidence that termination of his parental rights was in the Child's best interest. Nevertheless, out of an abundance of caution, we will address these issues.

Tenn. Code Ann. § 36-1-113(g)(6) (Supp. 2007) provides the following as a ground for terminating parental rights:

The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act,

under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

*In re E.M.P.*, No. E2006-00446-COA-R3-PT, 2006 WL 2191250 (Tenn. Ct. App. Aug. 3, 2006), involved a parent whose rights were terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6), among other reasons. We stated:

When terminating parental rights pursuant to § 36-1-113(g)(6) there are only two necessary findings relative to this statutory ground. Specifically, that the parent “has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years,” and that the child was “under eight (8) years of age at the time the sentence [was] entered by the court.” Tenn. Code Ann. § 36-1-113(g)(6). Here, at the time of the hearing, Mother either was or was not serving a ten year prison sentence .... Likewise, the child either was or was not under eight years old when Mother’s criminal sentence was imposed. Given that the child was born in July of 2000, she unquestionably was less than eight years old when Mother was sentenced to eleven years in prison in July of 2003. We believe that even with the sparse record on appeal, there is sufficient evidence for us to conclude that there was clear and convincing evidence presented to the Trial Court for Mother’s parental rights to be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6). We, therefore, affirm the Trial Court’s judgment insofar as it held that grounds had been proven by clear and convincing evidence sufficient to terminate Mother’s parental rights pursuant to § 36-1-113(g)(6).

*Id.*, at \* 6.

In the present case, there is no dispute that Father is serving a prison sentence in excess of 10 years, and that the prison sentence was imposed at a time when the Child was under the age of 8. Therefore, we conclude that there was clear and convincing evidence to terminate Father’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(6). The Juvenile Court’s judgment on this issue is affirmed.

Having concluded that there was clear and convincing evidence supporting one ground for terminating Father’s parental rights, the next issue is whether there was clear and convincing evidence that termination of his parental rights was in the Child’s best interest. Tenn. Code Ann. § 36-1-113(i) (Supp. 2007) provides as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

When the Juvenile Court undertook a best interest analysis, several factual findings were made. The Juvenile Court stated, in part, that:

I further find that it's in the child's best interest for this termination to occur.... There's no way at this point in time that [Father] can make an adjustment of circumstance to make it safe to be in his home because he's incarcerated and presumably will be for a long time. Again, he's, it's impossible for him to make a lasting adjustment of his circumstances even with the help from social services agencies because he's incarcerated.... He has not maintained regular visits with the child because he's been unable to because he's been incarcerated. However, that has diminished his relationship with this child and there's no meaningful relationship.... I think that a ... change in caretakers and physical environment at this point in time is, first of all it's impossible for this child to be in [Father's] custody. Secondly, it would have a severe emotional, psychological effect on this child.

After reviewing the statutory factors which are applicable to this case, as well as the Juvenile Court's findings of fact with respect to those factors, we conclude that clear and convincing evidence was submitted to the Juvenile Court that it was in the Child's best interest for Father's parental rights to be terminated.

### **Conclusion**

The judgment of the Juvenile Court is affirmed and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are taxed to the Appellant, J.S., and his surety, if any.

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D. MICHAEL SWINEY, JUDGE